

**REMARKS**

Reconsideration of the present application is respectfully requested in view of the following remarks. Prior to entry of this response, Claims 1-39 were pending in the application, of which claims 1-8, 14-21, and 27-34 are currently presented for examination. Of these, claims 1, 14, and 27 are independent. By this Amendment, Applicant has amended claims 1-8, 14, 15, and 27-34, and canceled claims 9, 10, 22, 23, 35, and 36.

In the Office Action dated September 29, 2008, the Examiner took the following actions:

- (1) rejected claims 1-10 and 27-36 under 35 U.S.C. § 101 as allegedly being directed to non-statutory subject matter; and
- (2) rejected claims 1-10, 14-23, and 27-36 under 35 U.S.C. § 103(a) as allegedly being unpatentable over Thompson, Paul; Psaraftis, Harilaos; "Cyclic Transfer algorithms for multivehicle routing and scheduling problems" (*Thompson*).

Applicant respectfully traverses the Examiner's rejections as follows.

**I. 35 U.S.C. § 101**

Applicant's amended claims render moot the Examiner's rejection under 35 U.S.C. § 101 of claims 1-10 and 27-36. In supporting that rejection, the Examiner asserted that "a § 101 process must (1) be tied to another statutory class (such as a particular apparatus) or (2) transform underlying subject matter (such as an article or materials) to a different state or thing." Office Action, page 2. Claim 1, as amended, explicitly recites that the method is computer implemented, and, therefore, tied to

another statutory class. Dependent claims 2-10, which rely on amended claim 1, implicitly recite that the method is computer implemented.

Similarly, claim 27, as amended, now clearly reflects the instructions are embodied on a computer-readable storage medium. Dependent claims 28-34, which rely on amended claim 27, also were amended to reflect the instructions are on a computer-readable storage medium. Consequently, Applicant respectfully requests that the Examiner withdraw the 35 U.S.C. § 101 rejection of claims 1-10 and 27-36.

## **II. 35 U.S.C. § 103(a)**

Applicant respectfully traverses the rejection of claims 1-10, 14-23, and 27-36 under 35 U.S.C. § 103(a) as being unpatentable over *Thompson*. A *prima facie* case of obviousness has not been established with respect to these claims, as amended, because the combined teachings fail to disclose, teach, or suggest the invention as claimed. The Office Action also fails to clearly articulate why it would have been obvious to modify the deficient teachings cited.

“The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. . . . [R]ejections on obviousness cannot be sustained with mere conclusory statements.” M.P.E.P. § 2142, 8th Ed., Rev. 6 (Sept. 2007) (internal citation and inner quotation omitted). “The mere fact that references can be combined or modified does not render the resultant combination obvious unless the results would have been predictable to one of ordinary skill in the art.” M.P.E.P. § 2143.01(III) (emphasis in original). “In determining the differences between the prior art and the claims, the question under 35 U.S.C. 103 is not whether the differences themselves would have been obvious, but whether the

claimed invention as a whole would have been obvious.” M.P.E.P. § 2141.02(I)  
(emphases in original).

“[T]he framework for objective analysis for determining obviousness under 35 U.S.C. § 103 is stated in *Graham v. John Deere Co.*, 383 U.S. 1, 148 U.S.P.Q 459 (1966). . . . The factual inquiries . . . [include determining the scope and content of the prior art and] . . . [a]scertaining the differences between the claimed invention and the prior art.” M.P.E.P. § 2141(II). “Office personnel must explain why the difference(s) between the prior art and the claimed invention would have been obvious to one of ordinary skill in the art.” M.P.E.P. § 2141(III).

- A. The cited reference does not teach “wherein evaluating the fit of the first load data further comprises: determining a common carrier cost for putting the first load on a common carrier; determining a dedicated cost for putting the first load on the first segment; and setting a savings criteria as the difference between the common carrier cost and the dedicated cost.”**

The cited reference does not teach or suggest “wherein evaluating the fit of the first load data further comprises: determining a common carrier cost for putting the first load on a common carrier; determining a dedicated cost for putting the first load on the first segment; and setting the savings criteria as the difference between the common carrier cost and the dedicated cost” as substantially recited in Applicant’s amended independent claims 1, 14, and 27. Instead, *Thompson* is completely silent with regard to these recitations.

Indeed, the Examiner acknowledges *Thompson* fails to teach these claim recitations, but instead relies on Official Notice that a common carrier incurs shipping costs for a load on a particular route. Office Action at 10-11. Even accepting this as

true, it would not have been obvious for one of skill in the art to modify *Thompson* in a way that results in the claimed subject matter. The system disclosed in *Thompson* does not consider using a common carrier, and is only directed to optimizing costs for a dedicated carrier. Therefore, one of skill in the art would not use *Thompson* to “[set] the savings criteria as the difference between the common carrier cost and the dedicated cost” and related determinations recited in Applicant’s amended claims. The Official Notice does not cure this deficiency.

Consequently, neither *Thompson* nor a combination of its teachings with the officially-noticed subject matter teaches or suggests “determining a common carrier costs for putting the first load on a common carrier, determining a dedicated costs for putting the first load on the first segment, and setting a savings criteria as the difference between the common carrier cost and dedicated costs” as part of “evaluating the fit of the first load data on the first segment,” as claimed. As a result, at least one recitation of amended independent claims 1, 14, and 27 is not disclosed, taught, or suggested by any combination of *Thompson* or the officially-noticed subject matter.

- B. The cited reference does not teach “ranking, in a first list comprising available loads for the first segment, the relative fits of the first load data and the second load data against the first segment; ranking, in a second list comprising available loads for the second segment, the relative fits of the first load data and the second load data against the second segment; assigning the load having the highest ranking fit from the first list to the first segment and removing that load from the second list.”**

Amended independent claims 1, 14, and 27 also recite “ranking, in a first list comprising available loads for the first segment, the relative fits of the first load data and the second load data against the first segment; ranking, in a second list comprising available loads for the second segment, the relative fits of the first load data and the

second load data against the second segment; assigning the load having the highest ranking fit from the first list to the first segment and removing that load from the second list.” ” Neither *Thompson* nor its teachings combined with the Notice taken by the Examiner discloses, suggests or teaches this claimed subject matter. Specifically, *Thompson*, including cited page 936, is silent with regard to both the claimed first and second lists of available loads, and any of the claimed ranking and assigning subject matter associated with those lists. As cited page 936 indicates, *Thompson* instead teaches calculating cyclic transfer values without regard to how they rank according to one another in lists of available loads. Therefore, no combination of *Thompson* and the officially-noticed subject matter discloses, teaches, or suggests the subject matter claimed by Applicant.

Therefore, an additional recitation of amended independent claims 1, 14, and 27 is not disclosed, taught, or suggested by any combination of *Thompson* or the officially-noticed subject matter.

**C. No *prima facie* case of obviousness**

For the above reasons, the Office Action fails to clearly articulate a reason why any combination of *Thompson* and/or the noticed subject matter would have rendered the claimed invention obvious to one of ordinary skill in the art. Consequently, a *prima facie* case of obviousness has not been established.

Because no *prima facie* case exists, Applicant respectfully requests that the Examiner withdraw the rejections of amended independent claims 1, 14 and 27. Because dependent claims 2-8, 15-21, and 28-34 necessarily contain the recitations of one of the independent claims, Applicant also requests withdrawal of the rejections of

the dependent claims for the same reasons, and allow pending claims 1-8, 14-21, and 27-34, as amended.

**III. Conclusion**

In view of the foregoing amendments and remarks, Applicant respectfully requests reconsideration and reexamination of this application and the timely allowance of the pending claims, 1-8, 14-21, and 27-34.

If the Examiner continues to dispute the patentability of the pending claims after considering the above, please call Applicant's undersigned representative, below.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON,  
FARABOW,  
GARRETT & DUNNER, L.L.P.

/Brannon McKay/

Dated: December 29, 2008

By: \_\_\_\_\_  
Brannon McKay  
Reg. No. 57,491  
(404) 653-6410